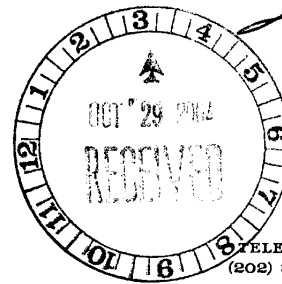


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October 29, 2004

**VIA HAND DELIVERY**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Room 711  
Washington, D.C. 20423

ENTERED  
Office of Proceedings

OCT 29 2004

Part of  
Public Record

ENTERED  
Office of Proceedings

OCT 29 2004

Part of  
Public Record

Re: Docket No. 42088, Western Fuels Association, Inc.  
and Basin Electric Power Cooperative v. The  
Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding please find an original and ten copies of Complainants' Motion For Protective Order. A WordPerfect Diskette containing an electronic copy of the submission is also enclosed. Counsel for Defendant have advised counsel for Complainants that Defendant does not object to entry of the proposed protective order.

An additional copy of the filing also is enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter.

Sincerely,

Christopher A. Mills  
An Attorney for Complainants

CAM: dmb  
Enclosures  
cc: Counsel for Defendant

OCT 29 2004

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Part of  
Public Record

WESTERN FUELS ASSOCIATION, INC.  
and BASIN ELECTRIC POWER  
COOPERATIVE

Complainant

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

Defendant

Docket No. 42088



**MOTION FOR PROTECTIVE ORDER**

Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative (collectively "WFA") hereby request that the Board enter a protective order for this proceeding, in the form provided in the Appendix to this Motion.

The proposed Order will facilitate discovery in this proceeding by protecting the confidentiality of materials reflecting the terms of contracts, financial information, and other confidential and proprietary information in the event that such materials are produced and/or included in evidentiary filings in this proceeding.

The proposed Protective Order is identical to the most recent Protective Orders entered by the Board in a stand-alone cost rate case; *see* Docket No. 41191 (Sub-

No. 1), AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company (“AEP Texas”), Decision served September 11, 2003, Appendix), except for the first two sentences of Paragraph 7. In addition, the proposed Order incorporates the principles reflected in the Board’s recent protective order-related decisions in Ex Parte No. 638.

The first two sentences of Paragraph 7 have been added to facilitate the production of confidential contracts that both parties agree are relevant to the preparation of their evidence in this case. In prior rate cases the parties have had to file separate, unopposed motions to compel the production of confidential contracts, which the Board has routinely granted. See, e.g., AEP Texas, Decision served October 7, 2003, at 1-2. Including a provision for the production of such contracts in the protective order itself eliminates the extra step of having to file a separate motion to compel and therefore promotes efficiency.

Counsel for WFA and counsel for BNSF have conferred with respect to the terms of a protective order for this proceeding. Counsel for BNSF has authorized WFA to inform the Board that BNSF does not object to entry of the proposed protective order set forth in the Appendix hereto.

Accordingly, WFA requests that a Protective Order be entered in the form provided in the Appendix hereto, including the forms of undertaking that accompany it.

Because the discovery process is underway, WFA requests that the proposed Order be entered on an expedited basis.

Respectfully submitted,

WESTERN FUELS ASSOCIATION, INC.  
and BASIN ELECTRIC POWER  
COOPERATIVE

OF COUNSEL:

Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

Dated: October 29, 2004

By: John H. LeSeur  
Christopher A. Mills  
Andrew B. Kolesar III  
Peter A. Pfohl  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036  
(202) 347-7170



Their Attorneys

**CERTIFICATE OF SERVICE**

I hereby certify that this 29<sup>th</sup> day of October, 2004, I served a copy of the foregoing Motion For Protective Order by hand delivery on designated outside counsel for BNSF, as follows:

Samuel M. Sipe, Jr.  
Anthony J. LaRocca  
Linda S. Stein  
Steptoe & Johnson, L.L.P.  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795

  
Andrew B. Kolesar III

**APPENDIX**

**PROTECTIVE ORDER**

1. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as "CONFIDENTIAL," and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
  - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
  - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising herefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
  - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, outside counsel for a party are permitted to retain file copies of all pleadings filed with the Board.
  - (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order." *See* 49 CFR 1104.14.
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data or other competitively sensitive information, as "HIGHLY CONFIDENTIAL." If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board or any Administrative Law Judge presiding over this proceeding. Material that is so designated may be disclosed only to outside counsel or outside consultants of the

party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as "HIGHLY CONFIDENTIAL" and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to stamp the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material to the Administrative Law Judge, the Board, or the court, as appropriate, with a written request that the Judge, the Board, or the court: (a) restrict attendance at the hearings during discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material; and (b) restrict access to the portion of the record or briefs

reflecting discussion of such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.

6. If any party intends to use "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material shall be kept under seal and treated as "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material in accordance with the terms of this Protective Order.
7. Each party is ordered to produce to the other party rail transportation contracts and other contracts which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the contracts be produced in discovery, and (2) the parties agree that the requested contracts are relevant in preparing their evidence in this proceeding. Any such contracts shall be treated as "HIGHLY CONFIDENTIAL" and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
9. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by an Administrative Law Judge decision from which no appeal is taken or by the Board, warrants suspension of any of the provisions herein.



10. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.
11. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as Highly Confidential by a producing party, without securing prior permission from the producing party. If a party (the "filing party") files and serves upon the other party (the "reviewing party") a pleading or evidence containing the filing party's Highly Confidential material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a Confidential Version of the pleading or evidence from which the filing party's Highly Confidential material has been redacted. The Confidential Version may be provided in hardcopy or electronic format at the option of the filing party, and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material ("In-house Personnel"). Alternatively, in lieu of preparing and serving a Confidential Version of any such pleading or evidence, the filing party may provide to outside counsel for the reviewing party a list of the filing party's own Highly Confidential information that must be redacted from its Highly Confidential Version prior to review by the reviewing party's In-house Personnel. If the filing party chooses this latter option, it shall provide the list to outside counsel for the reviewing party contemporaneously with the filing of the Highly Confidential version, and such outside counsel shall redact the designated material prior to review of the pleading or evidence by the reviewing party's In-house Personnel.

**UNDERTAKING  
CONFIDENTIAL MATERIAL**

I, \_\_\_\_\_, have read the Protective Order served [INSERT SERVICE DATE], governing the production of confidential documents in STB Docket No. 42088, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. 42088 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
Dated: \_\_\_\_\_

**UNDERTAKING  
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for \_\_\_\_\_, for which I am acting in this proceeding, I have read the Protective Order served [INSERT SERVICE DATE], governing the production of confidential documents in STB Docket No. 42088, understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

\_\_\_\_\_  
OUTSIDE [COUNSEL][CONSULTANT]

Dated: \_\_\_\_\_